Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL HIRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether intent to defraud is an essential element of a prosecution for false impersonation of a federal officer or employee under 18 U.S.C. § 912.

2. Whether two separate and distinct offenses derived from the same statute may be charged in one count without that indictment being duplicitous in violation of the Fifth Amendment.

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Hirano, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (entered December 28, 1993) is included in the Appendix at 1a-6a. The order of the court of appeals denying rehearing (entered January 24, 1994), is included in the Appendix at 9a. The judgment of the United States District Court for the Eastern District of Virginia is included in the Appendix at 7a-8a.

JURISDICTION

The judgment and opinion of the court of appeals was entered on December 28, 1993, and the petition for re-

hearing was denied on January 24, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that—

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

U.S. Const. amend. V.

Section 912 of Title 18 of the United States Code provides, in pertinent part, that—

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [guilty of a felony].

STATEMENT OF THE CASE

Petitioner Michael Hirano was indicted in the United States District Court for the Eastern District of Virginia on three counts of impersonating a federal officer or employee in violation of 18 U.S.C. § 912. Section 912 makes it a felony to "assume[] or pretend[]" to be an officer or employee of the United States and, in the alternative, either to (1) "act[] as such"; or (2) demand or obtain any "money, paper, document or thing of value." 18 U.S.C. § 912. Each count of the indictment in this case charged both "distinct crimes," *i.e.*, that petitioner pretended to be a federal employee and both "act[ed] as such" and demanded some "thing of value." App. 4a.

1. The evidence adduced at trial established that on August 1, 1992, petitioner approached Kelly Dodson, a security guard at the George Mason University Law School ("University"). Petitioner stated that he worked for "the agency." In order to verify this, petitioner placed a phone call and handed the phone to Dodson, who heard on the other end of the line "Federal Bureau of Investigation." Petitioner claimed to Dodson that this proved his identity. Petitioner then requested a copy of a police report on Mary Brett, an individual who was petitioner's social acquaintance. This request formed the basis for Count One of the indictment.

On August 4, petitioner approached University security guard, Michael Crawford, and identified himself as a Department of Defense employee. Crawford referred petitioner to Maurice Sobel, a University police officer. Petitioner then spoke to Sobel. During the conversation with Sobel, petitioner requested information regarding Larry Brett, the ex-husband of Mary Brett. This request forms the basis for Count Two.

On August 14, 1992, an individual identifying himself as Sergeant Harris of the United States Air Force called the University security office and spoke with University police officer Sobel. At trial, Sobel testified that the caller who had identified himself as "Harris" was the same individual who Sobel had spoken with on August 4th. During their conversation, the caller requested Mary Brett's home address. This request formed the basis for Count Three.

2. Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on all three counts. He was sentenced to four months' imprisonment on each count, with the sentences to run concurrently, and placed on supervised release for a period of one year. Petitioner's subsequent motion for a new trial and motion to re-open the bench

trial for the submission of new evidence both were denied.[1] A timely appeal to the Fourth Circuit followed.[2]

3. In his appeal to the Fourth Circuit, petitioner raised, *inter alia*, the following issues: (1) the insufficiency of the indictment; (2) the duplicity of the indictment because each count charged both of the "distinct crimes" defined in Section 912; and (3) the insufficiency of the evidence to support petitioner's convictions.

The court of appeals first rejected petitioner's argument that the indictment insufficiently alleged a demand for a "thing of value" because the "things" itemized in the indictment had no commercial or pecuniary value.[3] The court held that it was sufficient for the indictment to "simply track the statutory language" and for the government to allege that the defendant sought a "thing of value" without providing any detail. App. 3a-4a.

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[1] A motion to vacate the convictions pursuant to 28 U.S.C. § 2255 also was filed following sentencing, on June 24, 1993. That motion challenged the convictions based upon duplicity in the indictment and ineffective assistance of counsel. The § 2255 motion was denied by the district court, without hearing, on July 2, 1993, and a notice of appeal from this denial was filed with the Fourth Circuit on July 9, 1993. *See infra* note 2.

[2] Petitioner filed a motion for bond pending appeal that was denied on June 28, 1993. The appeal to the Fourth Circuit from the denial of bond pending appeal was consolidated with petitioner's appeal of the denial of his § 2255 motion. On August 16 and September 23, 1993, the Fourth Circuit issued orders granting petitioner bail pending appeal with certain conditions. In the decision below, the panel erroneously states that the September 23 order affirmed the denial of the § 2255 motion. App. 3a n.1; *see supra* note 1. In fact, the September 23, 1993, order only modified the conditions of petitioner's release pending appeal. There is no record of any Fourth Circuit order addressing petitioner's appeal from the denial of his § 2255 motion.

[3] The court described the three "things" demanded by Hirano as follows: (1) a "file" "concerning Mary and Larry Brett"; (2) "information regarding Mary Brett"; and (3) "Mary Brett's home address."

Turning to petitioner's argument that the evidence was insufficient to support the convictions, the court noted that the indictment alleged

> two distinct crimes: first, where one "pretends to be an officer or employee acting under authority of the United States . . . and acts as such," and second, where one "in such pretended character demands or obtains any money, paper, document, or thing of value." [Petitioner] contends that the government failed to prove that he had committed either of these offenses because at trial it failed to prove both the "acts as such" element of the first offense and the "demand" element of the second offense.

App. 4a. The court concluded that the evidence was sufficient to permit the trier of fact to determine that petitioner engaged in false impersonation of a federal officer by representing that he was a federal officer and "act[ing] as such." Having found that petitioner violated the first offense under Section 912 (*i.e.*, the prohibition on "act-[ing] as such"), the court stated that it "need not address" petitioner's challenge to the sufficiency of the evidence on whether petitioner had violated the second offense by demanding a "thing of value."

The panel stated that petitioner not only had represented himself as "an employee of various federal agencies but also [had] sought access to private information by virtue of his false authority." *Id.* at 5a. The court reasoned that such use of "false identities to gain access to private information amounted to an assertion of false authority and thus fulfills the 'acts as such' requirement of 18 U.S.C. § 912." *Id.* Because the court found "that the evidence adequately supports [petitioner's] conviction for the first offense prohibited by 18 U.S.C. § 912," *i.e.*, the "acts as such" offense, it refused to reach the issue whether "the information [petitioner] requested could . . . constitute a 'thing of value.'" *Id.* at 5a n.4.[4]

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[4] The court also "decline[d] to consider" the issue of duplicity in the indictment based upon its erroneous belief that it previously

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals perpetuates a longstanding conflict among the courts of appeals with respect to the elements of an offense under 18 U.S.C. § 912. In particular, there is a clear and direct conflict among the circuits on the issue of whether intent to defraud is an element of the offense under 18 U.S.C. § 912. Granting certiorari in this case would also permit the Court to resolve the existing conflict among the circuits on the question whether an indictment may charge both "distinct offenses" under Section 912 in a single count. Accordingly, this Court should grant certiorari to resolve the conflicts on these issues and to provide the necessary guidance in the interpretation of this federal criminal statute.

1. Petitioner's conviction was erroneously sustained because the government was not required to allege and prove an intent to defraud. There presently is a three-way split on this issue among the circuits, with the Fourth Circuit adopting the position, reflected in the decision below, that "intent to defraud" is not an element of the offense.

The false impersonation statute, in its current form, provides, in relevant part, that:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . and [either] acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [liable for a felony offense].

18 U.S.C. § 912. Prior to 1948, the predecessor of Section 912 was codified at 18 U.S.C. § 76 (1946) and provided as follows:

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had addressed this issue in its September 23, 1993, order, denying relief under 28 U.S.C. § 2255. App. 3a n.1. In fact, the September 23, 1993, order only addresses petitioner's request for bail pending appeal. *See supra* notes 1-2.

> Whoever with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, . . . and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person . . . any money paper document, or other valuable thing, [shall be liable for a felony offense].

In 1943, this Court in *United States* v. *Lepowitch*, 318 U.S. 702 (1943), held that the words "intent to defraud" mean that the defendant has "by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *Id.* at 704.

In reliance upon *Lepowitch*, Congress, in its substantial recodification of the federal criminal code in 1948, deleted the "intent to defraud" clause from the false impersonation statute. The Revisor's Notes on the recodification explain that it was the position of the Congress that "[t]he words 'with the intent to defraud the United States or any person' . . . were omitted as meaningless in view of *United States* v. *Lapowich*, 318 U.S. 702 [sic]." Revisor's Notes, 18 U.S.C. § 912 (1988).[5] Since this revision of the statute, various courts of appeals have disagreed as to whether scienter—*i.e.*, intent to defraud—remains an element of the offense of "falsely assum[ing] or pretend[ing]" to be a federal officer or employee.

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[5] As Judge Alexander Holtzoff, who assisted in the Code's revision noted:

> In general, with few exceptions, the Code does not attempt to change existing law. Every provision has been brought down to date. The law has been rearranged and greatly simplified and modernized in phraseology.

Preface to Title 18 U.S.C.A., *quoted in Honea* v. *United States*, 344 F.2d 798, 801 n.5 (5th Cir. 1965). Nearly every one of Judge Holtzoff's observations are applicable to Section 912. *See id.; see also*, Revisor's Note, 18 U.S.C. § 912 (1988) ("Changes were made in phraseology").

The Fifth Circuit has held that the deletion of the intent to defraud language in the "structural recodification" of the statute did not change the substantive elements of the offense. *Honea* v. *United States*, 344 F.2d 798, 803 (5th Cir. 1965). Thus, "[a]n intent to defraud or an intent to wrongfully deprive another of property" remained an essential element of a Section 912 offense. *Id.* at 802-03; see also *United States* v. *Randolph*, 460 F.2d 367, 370 (5th Cir. 1972) (finding that the *Lepowitch* Court "did not hold that an allegation of intent to defraud was unnecessary, but instead defined the nature of the 'fraud' required"). Accord *United States* v. *Pollard*, 486 F.2d 190, 191 (5th Cir. 1973) (holding that intent to defraud is a necessary element of both offenses under section 912). The Tenth Circuit has suggested that it would adopt a similar reading of the statute. See *Dickson* v. *United States*, 182 F.2d 131, 132 (10th Cir. 1950) ("[t]here must be the false representation of being an officer with intent to defraud, and some overt act in keeping with the false pretense"). This interpretation is consistent with congressional intent and the legislative history of section 912.[6]

Furthermore, the Fifth Circuit's interpretation of section 912 is consistent with the rule of lenity. This Court has long recognized "that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This principle, known as the rule of lenity, is founded on the

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[6] The legislative history indicates that although significant revisions were made to the penal code in 1948, "[t]he original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948). This Court often has noted that the 1948 recodification of the criminal code was not intended to make substantive changes in the law unless that intent was made clear by Congress. *See, e.g., Muniz* v. *Hoffman*, 422 U.S. 454, 467-74 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966).

belief that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917) (internal quotation omitted). Thus, where the petitioner's interpretation of an ambiguous statute "is a securely plausible reading of the statutory language," this Court "will apply the rule of lenity and resolve the ambiguity in the [petitioner's] favor." *United States* v. *Granderson*, 114 S. Ct. 1259, 1269 (1994).

The courts of appeals in the District of Columbia, Third, Eighth and Eleventh circuits have held that while "intent to defraud" need not be specifically alleged as a separate element of a Section 912 indictment, intent to defraud nevertheless remains an element of the crime of false impersonation. *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1402 (1993); *United States* v. *Wilkes*, 732 F.2d 1154 (3d Cir.), *cert. denied*, 469 U.S. 964 (1984); *United States* v. *Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States* v. *Rosser*, 528 F.2d 652 (D.C. Cir. 1976). However, these circuits apply a presumption that the scienter requirement is satisfied by proof that defendant undertook one of the two forms of conduct prohibited by statute. See *Gayle*, 967 F.2d at 486 ("Congress determined that 'intent to defraud,' as defined in *Lepowitch*, is automatically present any time the other elements of the offense (*i.e.*, [1] acting as such or [2] obtaining something of value) are proven").

The Second, Fourth, Seventh and Ninth Circuits take a contrary position, holding that the deletion of the "intent to defraud" language from the statute completely removed scienter as a necessary element of the offense. *United States* v. *Cord*, 654 F.2d 490 (7th Cir. 1981); *United States* v. *Rose*, 500 F.2d 12 (2d Cir. 1974), *vacated on other grounds*, 422 U.S. 1031 (1975); *United States* v. *Mitman*, 459 F.2d 451 (9th Cir.), *cert. denied*, 409 U.S. 863 (1972). The holding of the Fourth Circuit

in *United States* v. *Guthrie*, 387 F.2d 569 (4th Cir. 1967), is illustrative of this position:

> It cannot be assumed in these circumstances that Congress deleted an element theretofore regarded as essential without intending to affect the meaning of the statute . . . . We hold, therefore, that 'intent to defraud' is no longer an element of a charge under . . . [Section] 912.

Id. at 571. These circuits have adopted the position that "the injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent." *Id.*

Given these conflicting interpretations of the elements of the offense under Section 912, prosecutions under this statute—like the conviction at issue here—are contrary to the fundamental principal that "[c]riminal culpability for violation of federal statutes should turn on uniform law, not geography." *Wilkes* v. *United States*, 469 U.S. 964, 965 (1984) (White, J., dissenting from the denial of certiorari). There is a clear conflict among the circuits that warrants this Court's intervention and therefore, a writ of certiorari should issue to permit this Court to determine whether intent to defraud is an essential element of a Section 912 violation.

2. Petitioner was charged in each count of his indictment with both "distinct offenses" under Section 912. App. 4a. Under Rule 8(a) of the Federal Rules of Criminal Procedure, if a defendant is charged with two or more distinct offenses in an indictment, each offense must be set forth in a separate court. See generally 1 Charles A. Wright, Federal Practice and Procedure § 142 (2d ed. 1982).[7] Due to the duplicity in his indictment,

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[7] The prohibition against duplicitous indictments derives from at least four concerns. *See generally United States* v. *Cooper*, 966 F.2d 936, 939 n.3 (5th Cir.), *cert. denied*, 113 S. Ct. 481 (1992). First, such indictments fail to give a defendant adequate notice of the nature of the charges against him so that he can prepare his

petitioner was prejudiced in his trial preparation and his ability to present his defense at trial.

Section 912 of Title 18 defines two separate and distinct offenses. App. 4a; *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 569 (4th Cir. 1962). These offenses are: (1) the impersonation of a federal officer coupled with an overt act in conformity with the impersonation; and (2) the impersonation of a federal officer coupled with the demand for a paper, document or thing of value. *United States* v. *Rippee*, 961 F.2d 677, 678 (7th Cir. 1992); *Aguilar*, 756 F.2d at 1420. Because of the way the statute is set out, the government often charges in the conjunctive, alleging both crimes in a single count of the indictment.[8]

Two circuits have held that an indictment that combines the two offenses of Section 912 into one count is duplicitous. *Leggett*, 312 F.2d at 568-70; *Aguilar*, 756

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defense. *United States* v. *Kimberlin*, 781 F.2d 1247 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986). Second, duplicitous counts impinge on a defendant's Sixth Amendment right to know the charges against him, since a conviction on a duplicitous count could be obtained by way of a non-unanimous jury verdict as to each offense contained within the count. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Third, a duplicitous count can undermine a defendant's Fifth Amendment protection against double jeopardy as the lack of clarity may result in a subsequent prosecution. *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981). Fourth, a defendant may be prejudiced at evidentiary hearings. *United States* v. *Duncan*, 850 F.2d 1104, 1109 (6th Cir. 1988).

[8] Petitioner's indictment took the following form for each of the three counts:

> Michael Hirano did knowingly, willfully, and unlawfully falsely assume and pretend to be an officer and employee acting under the authority of the United States and a department and agency thereof, to wit [agency name], and act as such, and in such pretended character demanded papers, documents, and a thing of value, to wit: [item sought by petitioner].

F.2d at 1421. These holdings are in direct conflict with the Seventh Circuit, which in *United States* v. *Kimberlin*, 781 F.2d 1247 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986), held that such "duplicity . . . is of a technical semantic nature." *Kimberlin*, 781 F.2d at 1251. In fact, the Seventh Circuit has questioned whether charging both "separate offenses" in a single count truly is duplicitous: "[w]e have difficulty in seeing how an impersonator can demand or obtain (offense 2) without simultaneously acting (offense 1)." *Id.*

In this case, the court below refused to address this issue based upon the erroneous assertion that the issue previously had been addressed in a prior order. App. 3a n.1. Thus, the court reasoned that "[t]o sustain a guilty verdict as to each of the three counts in the indictment, the government had to adduce enough evidence to prove that [petitioner] violated only one of the two offenses charged in each count of the indictment." *Id.*[9] In essence, the government was permitted to charge both offenses in each count of the indictment and then, at trial, prove whichever one it chose.[10] This Court should grant certiorari to resolve the conflict in the circuits as to whether such an indictment under Section 912 is duplicitous and therefore violates petitioner's rights under the Fifth Amendment.

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[9] In fact, the government indicated during trial that it viewed Section 912 as defining a single offense which could be committed by the impersonator by either acting as a federal officer or making a demand of a paper, document or thing of value. App. 11a.

[10] As discussed above, the rule of lenity operates to resolve any ambiguity in favor of the petitioner. Where a statute's ambiguity leads to the government charging separate offenses in a single count, the rule "prescribes that doubt . . . be resolved against turning a single transaction into multiple offenses . . . ." *United States* v. *Duncan*, 850 F.2d 1104, 1109 n.4 (6th Cir. 1988) (citing *Bell* v. *United States*, 349 U.S. 81, 83-84 (1955)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1994

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5508

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL HIRANO,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CR-93-29-A)

Argued: October 1, 1993

Decided: December 28, 1993

Before RUSSELL, WIDENER, and HALL, Circuit Judges

OPINION

PER CURIAM

Michael Hirano appeals from his conviction for impersonating a federal employee in violation of 18 U.S.C.

§ 912. Because we find no merit in his arguments, we affirm.

I.

On three separate occasions, Hirano impersonated a federal employee with the goal of eliciting information about Mary Brett, a librarian at George Mason University Law School ("law school"), and her ex-husband, Larry Brett. On August 1, 1992, Hirano approached Kelly Dodson, a George Mason University police officer, at the law school and indicated that he worked for "the agency." To prove his identity, Hirano placed a telephone call and then put Officer Dodson on the line to hear the person answering the phone say, "Federal Bureau of Investigation." Hirano took the receiver, recited some apparent codes, and hung up. Hirano then asked Officer Dodson to furnish him with a police report concerning Mary Brett.

Three days later, Hirano approached Michael Crawford, a security guard at the law school, and identified himself as a Department of Defense employee. Hirano requested information regarding Larry Brett, whom he said was suspected of engaging in terrorist activities. Crawford referred Hirano to George Mason University police officer Maurice Sobel, and allowed Hirano to speak with Officer Sobel that evening when Officer Sobel telephoned Crawford. During his conversation with Officer Sobel, Hirano again requested information regarding Larry Brett.

On August 14, 1992, Hirano telephoned Officer Sobel and identified himself as Sergeant Harris of Bolling Air Force Base security. Hirano stated that Mary Brett was the subject of a trespassing warrant at Bolling Air Force Base and asked Officer Sobel to supply him with her home address.

Hirano was arrested and charged with three counts of impersonating a federal employee in violation of 18 U.S.C.

§ 912. After a bench trial, the district court found Hirano guilty on all three counts. On appeal before this Court, Hirano seeks reversal of his conviction on two grounds: 1) insufficiency of the indictment; and 2) insufficiency of the evidence supporting the district court's verdict.[1]

II.

Hirano first argues that the indictment charging him with impersonating a federal employee insufficiently alleges that he demanded a "thing of value" because the items the indictment alleges he demanded have no commercial value.[2] Hirano also contends that the indictment is insufficient because it does not allege why these items constitute "thing[s] of value."

To be sufficient, an indictment only needs to allege that the defendant's conduct satisfies all the elements of the crime with which he is charged. In doing this, the indictment may simply track the statutory language that defines these elements. *United States v. Lepowitch,* 318 U.S. 702, 704 (1943) (holding that an indictment using the statutory language of 18 U.S.C. § 912 to charge a defendant with false impersonation of a federal employee will withstand a motion to dismiss); *United States v. Fogel,* 901 F.2d 23, 25 (4th Cir.) (holding that an indictment which tracks statutory language is ordinarily valid), *cert. denied,* 498 U.S. 939 (1990). In the case at bar, the indictment need only have alleged that Hirano

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[1] Hirano also appeals the district court's judgment denying his motion, pursuant to 28 U.S.C. § 2255, to vacate the conviction because of duplicity in the indictment and ineffective assistance of counsel. Hirano, however, also raised these issues in a separate notice of appeal filed on July 9, 1993. By Order dated September 23, 1993, we affirmed the district court's denial of Hirano's section 2255 motion to vacate. We thus decline to reconsider the propriety of the district court's judgment as to these issues in this appeal.

[2] The indictment alleges that Hirano demanded a George Mason University police file concerning Mary and Larry Brett, information regarding Mary Brett, and Mary Brett's home address.

demanded a "thing of value." Each count of the indictment stated that Hirano demanded "a thing of value." The indictment need not indicate either what the items were that constituted "thing[s] of value" or why the items constituted "thing[s] of value." Thus, we find that the indictment was sufficient.

III.

Hirano next claims that the evidence produced at trial failed to support the district court's finding of guilt as to the three counts of false impersonation with which he was charged. We disagree.

18 U.S.C. § 912 sets out two distinct crimes: first, where one "pretends to be an officer or employee acting under authority of the United States . . . and acts as such," and second, where one "in such pretended character demands or obtains any money, paper, document, or thing of value." Hirano contends that the government failed to prove that he had committed either of these offenses because at trial it failed to prove both the "acts as such" element of the first offense and the "demand" element of the second offense. Because we find that there was sufficient evidence to support Hirano's conviction under the first offense prohibited by section 912, we need not address Hirano's challenge to the sufficiency of the evidence as to the second offense.[3]

In *United States v. Parker*, 699 F.2d 177, 180 (4th Cir.), *cert. denied*, 464 U.S. 836 (1983), we stated that a person "acts as such" in violation of the first offense prohibited by section 912 when he "assert[s] his pretended authority" over another. Applying this standard in that case, we found that the defendant had "act[ed] as such" when he told the owner of a firewood business that he was

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[3] To sustain a guilty verdict as to each of the three counts in the indictment, the government had to adduce enough evidence to prove that Hirano violated only one of the two offenses charged in each count of the indictment.

investigating a report that the owner was not paying taxes on the income he earned from his business. *Id.* at 179. We noted that the defendant's initial statement identifying himself as an agent of the Internal Revenue Service did not amount to an assertion of his false authority over the owner and thus would not be enough by itself to violate the "acts as such" element of the first offense prohibited by 18 U.S.C. § 912. *Id.*

Here, the government proved that Hirano not only represented to three individuals that he was an employee of various federal agencies but also sought access to private information by virtue of his false authority. Viewing the evidence in the light most favorable to the government, *United States v. Brewer*, 1 F.3d 1430, 1437 (4th Cir. 1993), we find that Hirano's use of the authority inherent in his false identities to gain access to private information amounted to an assertion of false authority and thus fulfills the "acts as such" requirement of 18 U.S.C. § 912. We therefore hold that the evidence supports Hirano's conviction under the three counts charging him with impersonating a federal employee in violation of 18 U.S.C. § 912.[4]

---

[4] Hirano also challenges the evidence supporting his impersonation conviction on two additional grounds. First, Hirano contends that the government produced insufficient evidence to establish that he represented to Officer Dodson that he was an employee of the Federal Bureau of Investigation ("FBI"). Viewing the evidence in the light most favorable to the government, *Brewer*, 1 F.3d at 1437, we find that Officer Dodson's testimony that Hirano told her he "worked for the agency," and that he called the FBI to prove to Officer Dodson "who he was, [and] who [sic] he worked for" provided ample evidence to establish that he had represented himself as an FBI employee.

Second, Hirano contends that the evidence inadequately supports his conviction for the second offense prohibited by 18 U.S.C. § 912 because the information he requested could not constitute a "thing of value." Because we find that the evidence adequately supports his conviction for the first offense prohibited by 18 U.S.C. § 912, we do not address this issue.

IV.

For the foregoing reasons, we affirm the district court's judgment finding Hirano guilty of three counts of impersonating a federal employee in violation of 18 U.S.C. § 912.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Virginia

Case Number: 1:93CR00029-001

UNITED STATES OF AMERICA

v.

MICHAEL HIRANO

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

[Filed Jun. 14, 1993]

THE DEFENDANT:

[ ] pleaded guilty to count(s) ———

[ ] pleaded nolo contendere to count(s) ——— which (was) (were) accepted by the court.

[X] was found guilty on count(s) 1, 2 and 3 of the Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC § 912	False personation of an officer or an employee of the United States	8-1-92	1
		8-4-92	2
		8-14-92	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ———

[ ] Count(s) ——— (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:

548-08-1990

Defendant's Date of Birth:

12-13-54

Defendant's USM No.: ———

Defendant's Mailing Address:

9519 Blake Lane
#T-1
Fairfax, VA 22031

Defendant's Residence Address:

9519 Blake Lane
#T-1
Fairfax, VA 22031

June 14, 1993
Date of Imposition of Judgment

/s/Albert V. Bryan, Jr.
Signature of Judicial Officer

ALBERT V. BRYAN, JR.
U.S. District Judge
Name & Title of Judicial Officer

June 14, 1993
Date

APPENDIX C

[Filed January 24, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5508-CR-93-29-A

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MICHAEL HIRANO,
Defendant-Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX D

[Filed: September 23, 1993]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5552

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

MICHAEL HIRANO,
Defendant-Appellee.

ORDER

Upon reconsideration of our order filed in this case on August 16, 1993, it is ORDERED that Hirano be let to bail pending appeal upon his own recognizance upon the condition that he be forthwith admitted to Charter Westbrook Hospital, Richmond, Virginia for a period of not less than thirty (30) days, as mentioned in a letter from his physician, Dr. John B. Davies, dated August 19, 1993, and on file with this court.

Hirano's attorney and the said Davies will see that Hirano is so admitted to said hospital and report that fact when accomplished to the clerk of this court.

With the concurrences of Judge Ervin and Judge Hall.

/s/ H. E. Widener, Jr.
For the Court

APPENDIX E

[Excerpt from Trial Transcript of the United States District Court for the Eastern District of Virginia Dated April 13, 1993]

* * * *

[109] I do have some problem with Count 2 though, whether the defendant raises it now or not, that the allegation is that they asked on August 4 for information regarding Mary Brett. I don't find any evidence that they asked for any information about Mary Brett on August 4.

MR. MARTIN: Your Honor, I'll address that. I believe that Your Honor's recollection of the evidence is correct. I would throw two things—I would submit two things to the Court, the more important one being that 18 U.S.C. 912 requires that the defendant in such pretended character either acts as such or in such pretended character demands or obtains any money. It's—we have to charge in the conjunctive, but the statute is written in the disjunctive. Accordingly, Your Honor, if you want to take away from your consideration the latter part of the charge in Count 2, that would still not require the count to be dismissed.

Moreover, Your Honor,—

THE COURT: I think you're right.

MR. MARTIN: I'm sorry?

[110] THE COURT: I think you're right.

MR. MARTIN: Thank you, Your Honor. Doesn't happen very often, Your Honor. Thank you.

THE COURT: Defendant call first witness.

MR. LABOWITZ: I call John Williams, Your Honor.

* * * *

Supreme Court, U.S.
FILED
JUL 27 1994
OFFICE OF THE CLERK

(2)

No. 93-1684

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL HIRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

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15 pp

QUESTIONS PRESENTED

1. Whether an indictment for impersonating a federal officer, in violation of 18 U.S.C. 912, must allege that the defendant acted with "intent to defraud."

2. Whether petitioner waived his objection to duplicity in the indictment by failing to raise the objection before trial pursuant to Fed. R. Crim. P. 12(b)(2).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1684

MICHAEL HIRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 14 F.3d 597 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1993. A petition for rehearing was denied on January 24, 1994. The petition for a writ of certiorari was filed on April 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on three counts of impersonating a federal employee, in violation of 18 U.S.C. 912. He was sentenced to four months' imprisonment, to be followed by one year of supervised release. C.A. App. 200-203.

1. Petitioner impersonated a federal employee on three occasions in order to obtain information about Mary Brett, a librarian at George Mason University (GMU) Law School, and her ex-husband, Larry Brett. On August 1, 1992, petitioner told Kelly Dodson, a GMU police officer at the law school, that he worked for "the agency." After placing a telephone call, petitioner handed the phone to Dodson, who heard the person answering say "Federal Bureau of Investigation." Petitioner took back the phone, recited some purported codes, and hung up. Petitioner claimed that the telephone call verified his identity. He then asked Dodson for a police report concerning Mary Brett. Pet. App. 2a; Gov't C.A. Br. 6.

Three days later, petitioner told Michael Crawford, another GMU security guard at the law school, that he was a Department of Defense employee, and he asked Crawford for information concerning Larry Brett. Petitioner said that Brett was suspected of engaging in terrorist activities. Crawford referred petitioner to Maurice Sobel, another GMU police officer. When Sobel telephoned Crawford later that evening, Crawford allowed petitioner to speak to Sobel. During that conversation, petitioner again requested information about Larry Brett. Pet. App. 2a; Gov't C.A. Br. 6-7.

On August 14, 1992, petitioner telephoned GMU's security office, and he again spoke to Officer Sobel.

Petitioner identified himself as Sergeant Harris of the Bolling Air Force Base security staff. He said that Mary Brett was the subject of a trespassing warrant, and he asked Sobel for Mary Brett's home address. Pet. App. 2a; Gov't C.A. Br. 7.

2. Petitioner was charged with impersonating federal employees, in violation of 18 U.S.C. 912.[1] Each of the three counts of the indictment alleged that petitioner "did knowingly, willfully and unlawfully falsely assume and pretend to be an officer and employee acting under the authority of the United States and a department and agency thereof * * * and act as such, and in such pretended character demanded * * * a thing of value[.]" C.A. App. 9-11. The district court found petitioner guilty on all three counts. *Id.* at 172-173.

Before trial, petitioner moved to dismiss the indictment because the three counts did not allege that he acted with an intent to defraud. Gov't C.A. Br. 4-5; C.A. App. 21-22. On the first day of trial, the district court orally denied the motion. Gov't C.A. Br. 6; C.A. App. 82.

After he was sentenced, petitioner moved to vacate his convictions pursuant to 28 U.S.C. 2255 on the grounds that the three counts of the indictment were duplicitous and that he had not received effective assistance of counsel. At the same time, he moved pursuant to Fed. R. Crim. P. 33 for a new trial by a jury. Gov't C.A. Br. 8-9;

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[1] Section 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

C.A. App. 215-232. The district court denied the motions. Gov't C.A. Br. 9; C.A. App. 241-243.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court rejected petitioner's claim that the indictment was insufficient because the "thing of value" described in each of the three counts did not have commercial or pecuniary value. *Id.* at 3a-4a. "To be sufficient," the court explained, "an indictment only needs to allege that the defendant's conduct satisfies all the elements of the crime with which he is charged." *Id.* at 3a. Because "[e]ach count of the indictment stated that [petitioner] demanded a 'thing of value[,]'" the court "[found] that the indictment was sufficient." *Id.* at 4a.

The court of appeals likewise rejected petitioner's claim that the evidence at trial was insufficient to sustain his convictions on the three counts of impersonating a federal employee. Pet. App. 4a-5a. The court observed that "18 U.S.C. § 912 sets out two distinct crimes: first, where one 'pretends to be an officer or employee acting under authority of the United States . . . and acts as such,' and second, where one 'in such pretended character demands or obtains any money, paper, document, or thing of value.'" *Id.* at 4a. The court noted that "the government proved that [petitioner] not only represented to three individuals that he was an employee of various federal agencies but also sought access to private information by virtue of his false authority." *Id.* at 5a. The court found that "[petitioner's] use of the authority inherent in his false identities to gain access to private information amounted to an assertion of false authority and thus fulfills the 'acts as such' requirement of 18 U.S.C. § 912." *Ibid.* Because the evidence was sufficient to sustain petitioner's convictions on the three counts for the first

offense prohibited by Section 912, the court concluded that it "need not address [petitioner's] challenge to the sufficiency of the evidence as to the second offense." *Id.* at 4a.

Finally, the court of appeals did not address petitioner's claim that the indictment was duplicitous because each count charged both offenses under Section 912. Pet. App. 3a n.1. After noting that petitioner had filed a separate notice of appeal from the district court's denial of his post-sentence motion to vacate his convictions pursuant to 28 U.S.C. 2255 because of duplicity in the indictment and ineffective assistance of counsel, the court stated: "By Order dated September 23, 1993, we affirmed the district court's denial of the [petitioner's] section 2255 motion to vacate." Pet. App. 3a n.1. The court therefore "decline[d] to reconsider the propriety of the district court's judgment as to these issues in this appeal." *Ibid.*[2]

ARGUMENT

1. Petitioner contends (Pet. 6-10) that his convictions for impersonating a federal employee under 18 U.S.C. 912 should be reversed because the indictment did not allege, and the government was not expressly required to prove, that he acted with an intent to defraud. Although petitioner raised that claim in his pretrial motion to dismiss the indictment in the district court, petitioner did not renew that claim in the court of appeals, and the court of appeals did not address it. See Pet. C.A. Br. 6-22; Pet. C.A. Reply Br. 1-5. "Where issues are neither raised

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[2] As petitioner notes (Pet. 4 nn.1, 2), the court of appeals' belief that its September 23, 1993, order had affirmed the district court's denial of petitioner's motion to vacate pursuant to 28 U.S.C. 2255 was mistaken. See Pet. App. 10a.

before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); see also, *e.g.*, *Berkemer* v. *McCarthy*, 468 U.S. 420, 443 (1984); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 759-760 n.6 (1984).

In any event, petitioner's claim does not warrant review by this Court. Before the revision of Title 18 in 1948, a conviction under 18 U.S.C. 76 (1940), the predecessor statute to Section 912, explicitly required an "intent to defraud either the United States or any person." In *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943), this Court explained that "the words 'intent to defraud,' in the context of this statute, do not require more than that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct."

In 1948, Congress deleted the "intent to defraud" language when it recodified the false personation statute as 18 U.S.C. 912. See Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 912, 62 Stat. 742. According to the pertinent part of the Reviser's Notes, "[t]he words 'with intent to defraud the United States or any person' * * * were omitted [from the revised section] as meaningless in view of *United States* v. *Lepowitch*." H.R. Rep. No. 304, 80th Cong., 1st Sess., A74 (1947). Thus, Congress concluded that the "intent to defraud" element was superfluous in light of *Lepowitch*.

Despite the 1948 revision, the Fifth Circuit subsequently concluded that an indictment charging a violation of Section 912 had to contain an allegation that the defendant acted with an intent to defraud. See *United States* v. *Pollard*, 486 F.2d 190, 191 (1973); *United States* v. *Randolph*, 460 F.2d 367, 369-370 (1972); *Honea* v.

United States, 344 F.2d 798, 801-804 (1965). In contrast, eight other circuits have concluded that "intent to defraud" is not required to be specifically pleaded in a Section 912 prosecution. *United States* v. *Rose*, 500 F.2d 12, 14-17 (2d Cir. 1974), vacated on other grounds, 422 U.S. 1031 (1975); *United States* v. *Wilkes*, 732 F.2d 1154, 1155-1159 (3d Cir.), cert. denied, 469 U.S. 964 (1984); *United States* v. *Guthrie*, 387 F.2d 569, 570-572 (4th Cir. 1967), cert. denied, 392 U.S. 927 (1968); *United States* v. *Cord*, 654 F.2d 490, 491-492 (7th Cir. 1981); *United States* v. *Robbins*, 613 F.2d 688, 690-692 (8th Cir. 1979); *United States* v. *Mitman*, 459 F.2d 451, 453 (9th Cir.), cert. denied, 409 U.S. 863 (1972); *United States* v. *Gayle*, 967 F.2d 483, 485-488 (11th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1402 (1993); *United States* v. *Maxwell*, 920 F.2d 1028, 1037 & n.12 (D.C. Cir. 1990); *United States* v. *Rosser*, 528 F.2d 652, 654-658 (D.C. Cir. 1976).

The Fifth Circuit's disagreement with the other eight circuits does not appear to reflect any substantial difference in the elements the government must prove to convict a defendant of a violation of Section 912. Although the Fifth Circuit alone requires that an indictment under Section 912 expressly allege intent to defraud, there is basic and uniform agreement between the Fifth Circuit and the other eight circuits that the government must prove that the defendant satisfied the intent requirement set out in *Lepowitch*, 318 U.S. at 704—*i.e.*, that he "by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." See, *e.g.*, *Rosser*, 528 F.2d at 656 ("virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting 'as such' seeks to cause the deceived person to follow some course he would not have pursued but for the

deceitful conduct") (internal quotation marks omitted); *Wilkes*, 732 F.2d at 1158 ("intent to defraud as defined by the Supreme Court in *Lepowitch* would be present whenever the element 'acting as such' was proven"); *Cord*, 654 F.2d at 492 ("implicit in the remaining language is the requirement that the 'acts' and 'demands' cause a victim to follow a path he would not otherwise have taken"); *Robbins*, 613 F.2d at 691 ("the language in *Lepowitch* puts some substance in the 'acts as such' element, requiring reliance on the impersonator's assertion of authority"); *Gayle*, 967 F.2d at 487 (adopting approach of *Rosser*).[3] The only issue on which there is a substantial difference concerns whether the *Lepowitch* intent requirement is an independent element of pleading and proof, or whether it is established as part of the proof of the other elements of the offense. Further review by this Court to resolve that largely semantic disagreement is not necessary.

Finally, this Court denied review of this issue in *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1402 (1993), and *United*

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[3] Petitioner notes (Pet. 9-10) that the Second, Fourth, Seventh, and Ninth Circuits have emphasized the elimination of the "intent to defraud" requirement under Section 912, see *Rose*, 500 F.2d at 16-17; *Guthrie*, 387 F.2d at 571; *Cord*, 654 F.2d at 492; *Mitman*, 459 F.2d at 453, while the Third, Eighth, Eleventh, and D.C. Circuits have reasoned that an indictment need not allege intent to defraud because the requisite intent is "present whenever the elements retained in section 912 are proven." *Wilkes*, 732 F.2d at 1159; see *Robbins*, 613 F.2d at 691; *Gayle*, 967 F.2d at 486-487; *Rosser*, 528 F.2d at 656-658. Because there is no practical distinction between the view that "intent to defraud" is not an essential element of Section 912 and the view that it is subsumed in the other elements of that provision, any difference in approach that may exist is inconsequential and does not warrant this Court's review.

States v. *Wilkes*, 732 F.2d 1154 (3d Cir.), cert. denied, 469 U.S. 964 (1984). Since that time, there has been no development warranting a different result in this case. Moreover, since the Fifth Circuit stands alone in requiring a Section 912 indictment to charge explicitly an intent to defraud and since the Fifth Circuit's most recent pronouncement on the issue in *United States* v. *Pollard*, *supra*, is over 20 years old,[4] the Fifth Circuit may reconsider its position if the occasion arises.

2. Petitioner also contends (Pet. 10-12) that he was prejudiced in his trial preparation and his ability to present his defense because the three counts of the indictment charging both offenses under 18 U.S.C. 912 were duplicitous. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides, however, that objections based on defects in the indictment, such as duplicity, must be raised before trial. Here, petitioner did not challenge the indictment on the ground of duplicity before trial. Rather, he first challenged the indictment on that ground after he had been sentenced when he moved to vacate his conviction pursuant to 28 U.S.C. 2255. Consequently, petitioner waived his claim that the indictment was duplicitous by failing to raise it in a timely manner. See, *e.g.*, *United States* v. *Baytank (Houston), Inc.*, 934 F.2d 599, 608-609 (5th Cir. 1991); *United States* v. *Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988) (collecting cases).

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[4] In *United States* v. *Cohen*, 631 F.2d 1223, 1224 (5th Cir. 1980), the court referred to the standard adopted by *Pollard*, *Randolph*, and *Honea*, but the court in *Cohen* upheld an indictment that included an allegation of intent to defraud. Consequently, it had no occasion to determine whether an indictment that did not include that allegation would have been sufficient.

In any event, petitioner's claim (Pet. 11) does not warrant review by this Court. The government conceded in the court of appeals that the three counts of the indictment in this case were duplicitous under *United States* v. *Leggett*, 312 F.2d 566, 569 (4th Cir. 1962).[5] Gov't C.A. Br. 9-10. It is well settled, though, that duplicity in an indictment "is not fatal, and does not require dismissal of the count." 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 523 (2d ed. 1982).[6] Here, petitioner suffered no prejudice as a result of the duplicity in each count of the indictment. Because the district court was the trier of fact, there was no risk of a nonunanimous verdict on any count at petitioner's bench trial. Moreover, because his acts of impersonation of a federal employee were intertwined with his demands for things of value, the duplicity in each count had no effect on petitioner's ability to prepare his defense. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250-1252 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986). Petitioner's fact-

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[5] Contrary to petitioner's contention (Pet. 12), there is no "direct conflict" among the circuits over whether a single count charging both offenses under Section 912 is duplicitous. Rather, the courts of appeals uniformly agree that a single count charging both offenses is duplicitous. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986); *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 568-569 (4th Cir. 1962).

[6] When a defendant timely objects to duplicity under Fed. R. Crim. P. 12(b)(2), "[t]he proper remedy is to require the government to elect upon which charge contained in the count it will rely." 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 523 (2d ed. 1982). Had petitioner objected before trial in this case, the government could have elected which charge to pursue, or it could have sought a superseding indictment charging petitioner in six, rather than three, counts.

bound claim to the contrary does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL HIRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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The government agrees that there is indeed a split in the circuits concerning whether the "intent to defraud" is an essential element of 18 U.S.C. § 921. The government nonetheless argues that any dispute is "largely semantic." Opp. 8.[1] That is not so. The Fifth Circuit has made clear that an indictment charging a violation of Section 912 must allege, and the government must prove, that the defendant acted with the intent to defraud. See *United States* v. *Pollard*, 486 F.2d 190, 191 (5th Cir. 1973); *United States* v. *Randolph*, 460 F.2d 367, 369-70 (5th

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[1] Respondent notes that although addressed by the district court, this issue was not considered by the court of appeals. Opp. 6. However, this Court has held that "pure issue(s) of law" presented in petition may be appropriate for decision even though not addressed by the lower court. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *see also Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

Cir. 1972); *Honea* v. *United States*, 344 F.2d 798, 801-04 (5th Cir. 1965). The Fifth Circuit imposes this requirement in order to protect the defendant against prosecution for harmless acts. Other circuits have held that an intent to defraud is not an element of the offense. This is not mere semantics but a crucial difference in the nature and scope of what the goverment must prove to establish a false personation offense. Any differences in interpretation among the circuits should be resolved by this Court to avoid the possibility that criminal culpability will turn more on geography than it will on the uniform application of federal law.

The government attempts to disparage the stark conflict among the circuits by arguing that the Fifth Circuit has not recently addressed the issue. Opp. 9. But, the law in the Fifth Circuit is well established, and there is no basis to believe that the Fifth Circuit would change its position today. The panel opinions at issue are the law of the Fifth Circuit until "en banc reconsideration or a superseding contrary decision of the Supreme Court." *Matter of Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991); see also *Pruitt* v. *Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991); *In re Fox*, 902 F.2d 411, 413 (5th Cir. 1990). Moreover, this Court consistently has granted certiorari based on the conflict involved and not the age of the conflicting cases. See, e.g., *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295, 300 (1976) (decision in conflict was nearly eighteen years old); *Commissioner* v. *Stidger*, 386 U.S. 287, 289 (1967) (conflicting decision was eighteen years old); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 754 n.1 (1961) (opinion in conflict was issued over twenty years earlier).

The government emphasizes the fact that "eight other circuits have concluded that 'intent to defraud' is not required to be specifically pleaded." Opp. 7.[2] Of course,

[2] The Fifth Circuit may not stand alone in requiring the intent to defraud. The Tenth Circuit has suggested that it would adopt a similar reading of the statute. *See Dickson* v. *United States*,

the fact that these circuits have aligned themselves may indicate nothing more than a shared but nonetheless mistaken approach. This Court has overruled the prevailing, not to mention unanimous, interpretation among the courts of appeals in the past. See, e.g., *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (overruling "each of the Courts of Appeals that has addressed the issue"); see also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1456 n.1 (1994) (Stevens, J., dissenting); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 225 (1987).

The government also notes that certiorari has twice been denied on the issue of whether intent to defraud is an essential element of a section 912 prosecution, see *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1402 (1993); *United States* v. *Wilkes*, 732 F.2d 1154 (3d Cir.), *cert. denied*, 469 U.S. 964 (1984), and that "[s]ince that time, there has been no development warranting a different result in this case." Opp. 9. It is of course well settled that a "denial of certiorari imports no implication or inference concerning the Court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973); see also *Darr* v. *Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) (denial of certiorari means nothing more than that "this Court has refused to take the case"); *United States* v. *Carver*, 260 U.S. 482, 490 (1923). Moreover, the conflict in the circuits has continued to persist since the Court denied review of the issue. It is now clear that this Court's review is necessary to bring uniformity to the law.

2. Respondent claims that this Court should not hear petitioner's duplicity claims because they were not preserved. In general, certiorari will not be granted where

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182 F.2d 131, 132 (10th Cir. 1950) ("[t]here must be the false representation of being an officer with intent to defraud, and some overt act in keeping with the false pretense").

"the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). Petitioner in fact raised this duplicity claim in the courts below, but the court of appeals declined "to reconsider the propriety of the district court's judgment as to these issues in this appeal." Pet. App. 3a n.1.[3] Thus, the claim has been preserved for this Court's review, and the court of appeals' failure to consider the claim does not foreclose this Court's review. Moreover, the legal issues involved are clear and well developed, and there is therefore no practical obstacle that would prevent an informed decision on the question by this Court.

All of circuit courts reaching this issue agree that an indictment that combines the two offenses of Section 912 into one count is duplicitous. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986); *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 568-69 (4th Cir. 1962). Petitioner's claim focuses not on the existence of the duplicity, but rather on the conflict that arises as to the practical effect of such a flaw in the indictment. On this issue, the Seventh Circuit parts company with the court below, as well as other circuits, and has indicated that such "duplicity . . . is of a technical semantic nature." *Kimberlin*, 781 F.2d at 1251. The question is whether the standard for determining whether an indictment is duplicitous may be set aside where the crime is false personation of a federal officer. That cannot be the law, and this Court should grant review to make that clear.

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[3] Although the Fourth Circuit was under the mistaken impression that it had decided the duplicity issue when it affirmed the district court's denial of petitioner's section 2255 motion to vacate, petitioner again raised the duplicity claim when he appealed his conviction to the court of appeals. Pet. App. 3a n.1.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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